Appeal No. UKEAT/0262/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUNSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 January 2015

Before

HIS HONOUR JUDGE PETER CLARK

MR G LEWIS

MRS L S TINSLEY

MR G CARTWRIGHT AND OTHERS — APPELLANTS

TETRAD LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MISS LORRAINE MENSAH (of Counsel) Instructed by: Simpsons Solicitors 3rd Floor, Thorne House 36 Station Road Cheadle Hulme Cheshire SK8 7AB
For the Respondent	MR DAVID READE (One of Her Majesty's Counsel) Instructed by: Gorvins Solicitors Dale House Tivot Dale Stockport Cheshire SK1 1TA

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

The employer imposed a 5% pay cut on the workforce without their express consent. The Employment Judge was entitled to conclude implied variation by consent in the absence of objection by the union or employees until 23 October 2012, the first reduced pay packet being issued on 10 May.

Whether certain remarks made by the Employment Judge at the beginning and end of the Employment Tribunal Hearing gave the appearance of bias in favour of the employer. Objectively, they did not.

The Claimant's appeal is dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This is an appeal by Mr Cartwright and others, Claimants before the Manchester Employment Tribunal, against the Judgment of Employment Judge Sherratt sitting alone, promulgated with Reasons on 10 April 2014, dismissing their claims for unlawful deductions from wages against their employer, the Respondent, Tetrad Ltd.

2. By way of background the Judge found that the Respondent, a furniture manufacturer, encountered financial difficulties. On 19 April 2012 the Board decided, in order to meet the requirements of the company's bankers, to impose a 5% wage cut across the workforce. That workforce is unionised, the recognised union being the GMB. A meeting between management and union representatives took place the next day. The Judge found that the union full-time officer, Mr Sutcliffe, was equivocal as to whether or not his members would agree to the pay cut (see paragraph 11). In answer to the first issue raised in the case (see paragraph 3(i)) he found that the employees did not give their express consent to the pay reduction.

3. The second, critical issue (paragraph 3(ii)) was whether the workforce impliedly consented to the reduction. As to that, he found that a union meeting took place on 20 May 2012, but no outcome was communicated to management. Further meetings took place in the summer. However it was not until October 2012 that the union's solicitors wrote a letter before action indicating a future "Wages Act" claim. The Form ET1 was not lodged until February 2013.

4. The Judge was referred among other cases to the Judgment of Elias J (as he then was) in **Solectron (Scotland) Ltd v Roper** [2004] IRLR 4, where at paragraph 30 his Lordship said this:

> **"The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? [My emphasis] That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract continuing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct."**

5. The Judge found (paragraph 14) that there was no formal objection by the union to the change in the pay rate, which took effect from 30 April 2012 and first appeared in pay statements on 10 May; no grievance was raised and no individual objections raised by employees. The first indication of objection came with the union's solicitors' letter, which was dated 23 October.

6. On those facts the Judge concluded that the Claimants had accepted the variation by conduct so that no unauthorised deductions had been made from 10 May 2012.

The Claimants' Case

7. In advancing this appeal Miss Mensah submits that in reaching his decision the Judge failed to take into account material facts; reached a perverse conclusion and failed to consider material evidence: principally, the suggestion by the Claimants that the Respondent had obstructed the union's ability to consult with his members by not allowing meetings during working hours on the premises. Mr Reade QC tells us that such meetings were permitted but during breaks.

8. However, we agree with Mr Reade that this did not materially affect the position. The undisputed facts are as found by the Judge and summarised above. Applying the approach of Elias J in **Solectron** the question for us on appeal is whether, on the facts found, the Judge was entitled to conclude that by continuing to work without protest until 23 October the Claimants had, taking account of all the circumstances, accepted the change in their terms and conditions as to pay. In our collective judgment, the answer to that question is yes. Accordingly the first three grounds of appeal fail and are dismissed.

9. That leaves a separate ground of alleged apparent bias. The basis for that contention lies in certain remarks made by the Judge. First, at the commencement of the hearing he said that it was sad to see yet another British furniture company in financial difficulty having recently known of the demise of another well-known British furniture company and then, having delivered his Judgment, commented that the Claimants might consider themselves lucky to have jobs and, to the Respondent, that now that the business was doing better it might want to consider reinstating the 5%. There are slight differences in recollection, but that is the thrust of those three remarks.

10. Applying Lord Hope's test in **Porter v Magill** [2002] 2 AC 357, paragraph 103, would the fair-minded and informed observer, having considered the facts, conclude that there was a real possibility that the Tribunal was biased? Our short answer is no. Whilst those remarks are not particularly helpful, they are not relevant to the two issues which the Judge had to decide (see, again, paragraph 3 of the Reasons). His sympathy appears to have extended to both the company, which, in common with other businesses, experienced financial difficulties during the downturn and to the loyal employees who had remained with the company and borne the pain of a pay cut which, as trading improved, the company may wish to recognise by restoring the

previous pay levels. To that extent the remarks were even-handed. We repeat, not particularly helpful, given the subjective reaction of the Claimants, but not such as to cause the objective observer to conclude that there was a real possibility of bias in favour of the Respondent.

11. For these reasons this appeal is dismissed.